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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

QUIA CORPORATION, a Delaware corporation, Plaintiff, vs. MATTEL, INC., a Delaware corporation; FISHER-PRICE, INC., a Delaware corporation, Defendants.	CASE NO. CV 10-1902-JF (HRL) **PLAINTIFF'S MOTION IN LIMINE NO. 1 TO PRECLUDE EVIDENCE AND ARGUMENT REGARDING THE COURT'S ORDER CONDITIONALLY DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION** **[MOTION IN LIMINE NO. 1]**

I.

INTRODUCTION

IXL Learning moves in limine to preclude the introduction into evidence and any reference to this Court's Order Conditionally Denying IXL Learning's Motion for Preliminary Injunction, Docket No. 61 (June 15, 2010) ("PI Order). Permitting the jury to see or hear reference to the Court's PI Order will greatly prejudice IXL Learning's claims. The Court's order is highly prejudicial to IXL Learning because it found, among other things, that IXL Learning was not likely to prevail on its claims. The Court specifically stated:

> The balance of the factors leans heavily towards a finding that the reasonably prudent consumer of these products would not be confused by the similarity of the marks and the manner in which they are used.

(PI Order at 16.)

As the jury will be asked to decide this very question – whether a reasonably prudent consumer is likely to be confused – the Court's finding, albeit preliminary, is highly likely to unduly prejudice the jury against IXL Learning's claims. For this very reason, courts have repeatedly held that juries should not be allowed to see the Court's prior orders discussing the merits of claims they are considering.

Accordingly, the Court should exclude evidence, argument, or reference to the Court's order conditionally denying preliminary injunction.

II.

ARGUMENT

A. The Court's Order Conditionally Denying Preliminary Injunction Will Unduly Influence The Jury's Consideration Of IXL Learning's Claims.

As numerous courts have held, allowing a jury to see or hear reference to the Court's previous orders on the merits of a party's claim is highly prejudicial to that party's claims. See S.E.C. v. Retail Pro, Inc., Case No. 08-CV-1620, 2011 WL 589828, at *4 (S.D. Cal. Feb. 10, 2011) (granting motion in limine excluding evidence of and references to court's summary judgment order due to the "substantial risk of jury confusion and unfair prejudice to Defendant."); Hewlett-Packard Co. v. Mustek Systems, Inc., Case No. 99-CV-351, 2001 WL 36166855, at *4 (S.D. Cal. June 11, 2001) (excluding as prejudicial any "reference to any statement, finding, or ruling in the Court's summary judgment orders" and "any of the Court's prior orders or rulings."); Koito Mfg. Co., Ltd. v. Turn-Key-Tech, L.L.C., Case No. 02-CV-0273, 2003 WL 25674799, at *3-4 (S.D. Cal. April 10, 2003) (excluding as prejudicial a German court's patent validity decision regarding the patent at issue in the case); Park West Radiology v. CareCore Nat'l LLC, 675 F. Supp. 2d 314, 324 (S.D.N.Y. 2009) (excluding from the jury references to the court's order denying preliminary injunction because it is "likely to unduly influence the jury").

The Mustek Systems and Park West decisions are particularly instructive here. First, Mustek Systems involved a motion in limine to preclude plaintiff from referring to the court's summary judgment orders for the description of the patent at issue and the areas where the Court had found infringement as a matter of law or where infringement was not contested. Mustek Systems, 2001 WL 36166855 at *4. The court granted the motions in limine, "excluding reference to any statement, finding, or ruling in the Court's summary judgment orders." Id. It further instructed that "[t]he parties shall not refer to any of the Court's prior orders or rulings." Id.

Similarly, Park West involved a motion in limine to preclude reference to the Court's order denying a motion for preliminary injunction and the making of the motion. Park West, 675 F. Supp. 2d at 324. There, the Court granted the motion in limine on the basis that allowing the jury to see the Court's prior order would unduly prejudice plaintiff's claims. Id. It held that even references to the making of a motion for preliminary injunction should be excluded due to "the risk of undue influence on the jury pursuant to FRE 403." Id.

So too here. As in Mustek Systems and Park West, permitting the jury to see the Court's order conditionally denying IXL Learning's motion for preliminary injunction will greatly prejudice IXL Learning's claims. The Court's order denying preliminary injunction includes a detailed discussion of each of the Sleekcraft factors as applied to Plaintiff's claims.

(PI Order at 5-16.) Significantly, the Court's order concludes – albeit at a preliminary stage of the proceeding – that "[t]he balance of factors leans heavily toward a finding that the reasonably prudent consumer of these products would not be confused by the similarity of the marks and the manner in which they are used." (Id. at 16.) Putting this order before the jury will undoubtedly unfairly prejudice IXL Learning's claims.

B. The Severe Prejudice To Plaintiff Cannot Be Mitigated By A Limiting Instruction.

There is simply no way to mitigate the severe prejudice to IXL Learning of showing the jury the Court's PI Order. The jury will likely be confused as to how to interpret the Court's order. Apart from the instruction not to consider the Court's determinations that IXL Learning is not likely to prevail on any of its claims, the jury will also have to be educated, likely through evidence and argument, that:

- the preliminary injunction proceeding involved a different (and higher) standard than that which the jury should apply;
- an order on a motion for preliminary injunction is not the law of the case and is therefore not binding on the jury; and
- the order denying IXL Learning's motion for preliminary injunction was decided based on the evidence then available, and prior to discovery and the full development of the factual record.

Moreover, the jury will have to reconcile the Court's findings at the preliminary injunction stage that IXL Learning was unlikely to prevail on its claims with the fact that the Court later permitted those very same claims to go to trial. Should IXL Learning's claims proceed to trial, it will necessarily mean that the Court has determined that a reasonable jury could find in favor of IXL Learning.

Recognizing these risks, courts in this Circuit have held that showing the jury the court's prior findings decided under "differing legal standards" than "[the claims] which remain to be decided by the jury" poses "a significant risk of confusing the jury." See, e.g., Retail Pro, 2011 WL 589828, at *3 (declining to issue Rule 56(g) order regarding facts no longer in dispute). Such instructions and evidence are very likely to lead to jury confusion here as well.

C. Evidence Of The Court-Ordered Disclaimer Should Be Presented To The Jury Through An Appropriate Instruction.

To the extent it is necessary to introduce evidence of the fact that Defendants included the Court-ordered disclaimer on their website, IXL Learning submits that the Court should instruct the jury that Defendants were ordered to do so by the Court in an earlier proceeding in this case. Otherwise, with the PI Order excluded from evidence, Defendants would be free to suggest, and the jury free to assume, that Defendants included the disclaimer of their own accord, demonstrating their good faith here. Such arguments and inferences should not be permitted. Accordingly, should Defendants be permitted to introduce evidence of the fact that they included a disclaimer on their website, the Court should instruct the jury that Defendants were ordered to do so by the Court in an earlier proceeding in this case.

III.

CONCLUSION

For all of the foregoing reasons, IXL Learning respectfully requests that the Court preclude the introduction of, reference to, or argument regarding the Court's order conditionally denying IXL Learning's motion for preliminary injunction.

DATED: July 8, 2011

Respectfully submitted,

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